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The time period for reply, if any, is set in the attached communication.

## RECORD OF ORAL HEARING

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Ex parte MICHAEL R. HARTER, ROBERT J. HARTER,  
and TYLER R. HARTER

Appeal 2009-2002  
Application 10/813,421  
Technology Center 3600

Oral Hearing Held: April 7, 2009

Before HURBERT C. LORIN, DAVID B. WALKER, and BIBHU R. MOHANTY, Administrative Patent Judges

## ON BEHALF OF THE APPELLANTS:

ROBERT J. HARTER  
4233 CLIFFSIDE DRIVE  
LA CROSSE WI 54601

The above-entitled matter came on for hearing on Tuesday, April 7, , commencing at 9:05 a.m., at The U.S. Patent and Trademark Office, Dulany Street, Alexandria, Virginia, before Christine L. Loeser, Notary ic.

1           JUDGE LORIN: Okay. Could you state your name clearly for the  
2 court reporter, please.

3           MR. HARTER: Robert J. Harter, H-A-R-T-E-R.

4           JUDGE LORIN: Mr. Harter, when you are ready, you may proceed.  
5 You will have 20 minutes.

6           MR. HARTER: Okay. I think I will need only ten minutes.

7           Again, I'm Bob Harter and I'm also the co-inventor with my  
8 computer-geek brother, Mike, and my computer-geek son, Tyler. Together  
9 we have developed a software program that helps identify a person's  
10 allergies.

11           It was originally written to help identify my wife's allergies. She has -  
12 - in a typical week, she will have seven headaches -- I'm sorry, about six  
13 headaches in seven days. It was very frustrating and they seemed to be  
14 caused by foods but we couldn't figure out what they were. So this program  
15 helped us figure out what the problem was.

16           But the case itself, if there's one thing that the prosecution of the case  
17 that's been established is that this invention, as claimed, is novel. It is  
18 unique. There is -- if this weren't the case, I would be facing a 102 rejection,  
19 which is not the case.

20           So if you were to allow the claims, it's not like it's preventing anybody  
21 from doing this. We are the only ones that propose doing it. We want to do  
22 it.

23           The only question that's remaining is the obviousness. That's what's  
24 unsettled. That is what I am going to try to explain, why I feel this invention  
25 is not obvious.

26           Basically, the prior art, there's two methods of finding or determining

1 a person's allergies. It's the skin-prick test and an elimination diet. My wife  
2 has tried both.

3 The way I look at it, the obviousness issue, is if I were to walk into a  
4 clinic and they were to do a skin-prick test where they inject allergens under  
5 the skin and they look for any swellings to determine which allergens might  
6 be causing the reaction, I would not be surprised, and we have done that.

7 If I went to another clinic and they said, Okay, we are going to do the  
8 elimination diet. Tell me something about your diet, we could say, Well,  
9 you know, we like Chinese food and desserts.

10 The doctor could say, Well, Chinese food, there is lots and lots of rice,  
11 soy sauce. Let's try to remove that from your diet and see if it solves the  
12 problem, and if it does, we'll reintroduce perhaps rice and/or the soy sauce  
13 and we will find out if possibly those two items are causing the reaction.  
14 And if not, then we will look at other foods you have eaten and we will try  
15 that.

16 So let's go home and you take the rice and the soy sauce out of the diet  
17 and see what happens. That would not surprise me.

18 If I went to yet another clinic and they told me, You know what, we  
19 are not going to do a skin-prick test. And we are not going to do an  
20 elimination diet. You don't have to tell me what foods you eat, foods you  
21 don't eat. We are not going to discuss your diet.

22 In fact, I just want you to just go back home. I don't even need to talk  
23 to you. Just go back home, eat whatever you like, don't take anything out of  
24 your diet, just eat as normal, but record -- go to bobharter.com and enter in  
25 whatever foods you eat and any reactions you have. Come back in six  
26 weeks and I'll tell you what you are allergic to.

1        That would either really surprise me and I would be shocked by that,  
2    say, Wow, that is cool, or I would walk away saying, That's quackery. I  
3    don't believe it.

4        But it turns out it does work, and this system has identified things that  
5    my wife is allergic to that the skin-prick test failed to identify and the  
6    elimination diet failed to identify.

7        As one example, it's garlic. They don't test for that in a skin-prick test  
8    and it's not a common allergen but it certainly causes my wife's headaches.

9        The problem with a -- there's actually -- there is a couple of problems  
10   with the elimination diet and that explains why it does not work. We have  
11   tried it, it failed, and here is why.

12        Basically, a person has a tolerance to certain allergens. They have a  
13   threshold that you can tolerate and some people are more sensitive to some  
14   allergens than others. For example, even a snake venom, if you have it in a  
15   small enough quantity, you can handle it, but as it reaches the threshold,  
16   something happens, you get a reaction.

17        So different foods have different levels of impact on a person's body.  
18   To try to illustrate this, I have come up with these cards.

19        Basically, here are foods that are -- I'm ranking these foods from zero  
20   to 10 as far as how severely a person reacts. In the wheat, corn, peanuts, I  
21   gave them a 9 just as an example, highly reactant.

22        Then other foods like meat, this person might -- turkey, beef, chicken,  
23   I will give that a zero. They don't react. Then there are other items that are  
24   just marginal like chocolate milk and sugar; I rank that as 4. There is some  
25   reaction but it is not that bad. They can tolerate it.

26        Now let's try the elimination diet. The person says okay. The doctor

1 puts the person on wheat, turkey, beef, chicken. Wheat is 9, turkey is zero,  
2 beef is zero, chicken is zero. It's 9 even though they are taking it, they are  
3 exposed to wheat, which they are highly reactive to. But because the rest of  
4 their diet is so squeaky clean, there is no reaction.

5 They go, Okay. Well, it looks like those things are okay. Let's throw  
6 in chocolate. That's a 4. Now they are exposed to wheat and chocolate, so  
7 13 throws them over the threshold. They get a reaction. They go, Oh, man.  
8 Must be the chocolate is a problem. Let's take the chocolate back out, the  
9 elimination diet.

10 Now we are back to 9, the reaction goes away. Oh, man, we go back  
11 and forth and it's the chocolate. I'm sure of it.

12 So now they say, Let's try something else. They have now missed --  
13 the elimination diet has missed the wheat, which is a 9. So now they say,  
14 Okay, we will put you on a diet of chocolate, milk and sugar, 4, 4 and 4.  
15 That adds up to 12.

16 Pow, they get a reaction, even though, oh, here is the chocolate again,  
17 even though these items are not as bad as wheat, but they had so many of  
18 them. The cumulative effect put them over the edge. That's one reason it  
19 doesn't work.

20 JUDGE MOHANTY: Mr. Harter, I have a -- you have 20 minutes. I  
21 know you are an independent inventor. Sometimes -- I don't -- there is a  
22 distinction between what you have invented and what you have claimed.

23 So when we are looking whether you are going to be granted this  
24 patent or not, it is not what you have invented but what you have claimed.  
25 So I don't doubt that there is merits to your invention but it is what you have  
26 claimed.

1           So when your brief was filed, your brother filed the brief?

2           MR. HARTER: No, I did.

3           JUDGE MOHANTY: You filed the brief? I wonder if we could --  
4 rather than you spend your entire 20 minutes talking about the invention,  
5 because what we are looking at here is that the prior art, the scope of the  
6 prior art in view of your claims. That's what the patent will be granted on.

7           So I wonder if you could focus on how the rejection at hand that the  
8 examiner has applied, which is essentially we are going to determine, here  
9 particularly Berkow, which is the Mercke reference, and Evans, how those  
10 two references differ from, for example, your claim one.

11          MR. HARTER: Okay. Understood. The reason I didn't focus on that  
12 is because we have gone around this over and over again, the rejection, my  
13 response, rejection, response, and it's already been established that the  
14 claims, as they are written, are novel, they are unique, they do not read in the  
15 prior art.

16          The only remaining question was really the obviousness of it. That's  
17 the reason I was explaining why I feel -- I have already overcome, the claims  
18 are already sufficiently narrow that it's not reading on any prior art.

19          Again, if you were to allow the claims, I'm not preventing any doctor,  
20 clinic, anybody, from doing it. I'm the only one that wants to do it. So as far  
21 as the prior art, trying to address this --

22          JUDGE MOHANTY: This is your opportunity to just -- because we  
23 are not the examiners. This is why there is another level where you get  
24 another level of review. You may discuss with the Examiner.

25          I just want to make sure that you -- your position that the Berkow  
26 reference is -- it's correlating tests versus influencing agents. That's your

1 main argument, correct?

2 MR. HARTER: It's really not.

3 JUDGE MOHANTY: That, and that there's not a determinative single  
4 agent that's selected, right?

5 MR. HARTER: You know, I could not pick a specific element in my  
6 claims. I cannot say element E is not found in Berkow or Evans. I'm not  
7 saying that.

8 You can piece this together. Every one of my elements, you can  
9 probably find it in the prior art. But the reason I feel it is patentable is that  
10 this combination of these elements, it is not -- is not only not done but it is  
11 not obvious.

12 What frustrates me is that the system we came up with, which truly  
13 has helped my wife, it truly does work, this is not a gimmick. And yet it's  
14 superior over the skin-prick test and the elimination diet, both of which is in  
15 Berkow.

16 But I'm puzzled by how is it a system that is -- basically renders an  
17 elimination diet or skin-prick test almost obsolete, how is it that reference  
18 can be used to reject it?

19 JUDGE MOHANTY: In your -- for example, your one-page  
20 summary, our page 103, where you made a distinction between Berkow  
21 comparing a test to the reaction whereas you are testing the influencing  
22 agent. So I didn't see where that was in Berkow.

23 I mean, right now what you are saying now is something different  
24 than you are saying in your brief. In your brief, you said that there were  
25 things that were missing in Berkow.

26 MR. HARTER: I could find that and we could discuss that, but we

1 are kind of treading into, you know, 30 pages of rejection and 30 pages of  
2 responses. But this support that I have in the summary, I can certainly find  
3 where Berkow --

4 JUDGE MOHANTY: I know there's a lot of things going on here. I  
5 think you may have been confused because in your arguments, you are  
6 saying there are specific things that are missing in Berkow. It's not just an  
7 issue of obviousness that there are things in Berkow that are missing.

8 And now when you came in here, I don't know if you got confused,  
9 but you said, Well, it's all there but it's a question about obviousness.

10 When I go to your one-page summary, you say that these things are  
11 missing in Berkow. I didn't see those in Berkow. You know, sometimes  
12 inventors come here and they want to talk about, My invention is different in  
13 this way or that way, but in patentability, what we are really doing is looking  
14 at the claims and specifically the rejections that applies to the claim.

15 MR. HARTER: If you want to dig into it, I found in the amended  
16 appeal brief --

17 JUDGE MOHANTY: If you want to stick with what is in the brief,  
18 that's fine. I am just giving you the opportunity.

19 MR. HARTER: I will take that opportunity. I will take what I can  
20 get. I did address it in the appeal brief. I pointed out that Berkow, and I will  
21 say right here -- I will read it line for line.

22 The examiner states, Berkow also teaches that patterns of symptoms  
23 may be correlated to environmental exposures, but the applicant cannot find  
24 where Berkow says this.

25 On page 650, paragraph 4, of Berkow, it actually says, quote, Results  
26 are correlated with the pattern of symptoms and related to environmental

1 exposures, end quote. Berkow's statement, it is a little confusing, but it  
2 appears that Berkow is saying that the results are correlated with the pattern  
3 of symptoms and results are related to environmental exposures.

4 The Applicant, I am having difficulty making sense of it because it is  
5 a little bit -- it really isn't clear. But what it appears to say is that -- well,  
6 because Berkow clearly -- he does say this. Quote, the results are correlated  
7 with a pattern of symptoms.

8 In other words, it appears that the test results and the symptoms are  
9 compared for correlation, whereas in my claims, the exposures in the  
10 symptoms are compared for correlation.

11 I made that argument. That is the argument I was saying, Hey, that  
12 pulls some weight. That's what I was trying with the Examiner. It didn't cut  
13 it.

14 So I thought, I'm trying a different tack here. Why even argue it even  
15 farther? I have already overcome the 103 rejection. Let's talk obviousness.  
16 I'm trying to present things that I can't present on paper.

17 JUDGE MOHANTY: I just want you to know that when you present  
18 a case here, you are given another opportunity to make arguments that you  
19 made before. That is why there is another level of review.

20 MR. HARTER: I appreciate that. I was trying to make a new  
21 argument that I have difficulty presenting it in paper. I made all my paper  
22 arguments.

23 The other problem that I didn't finish, as far as this example, the other  
24 problem with the elimination diet, we are talking three or four foods.

25 Let's say there is a person that doesn't eat lunch, doesn't eat dinner and  
26 they only eat toast and coffee for breakfast. That is about as simple as you

1 get.

2 When you think about it, toast and coffee, you are talking wheat, you  
3 are talking butter, you are talking coffee, you are talking cream, you are  
4 talking sugar. You have got five ingredients right there.

5 I mean, the elimination diet, it doesn't work. You add all this to the  
6 equation and it's overwhelming, and at that point, I told my wife, I said,  
7 Time out. This is not working.

8 That's when we went to the software program and sorted it out. Now  
9 the complexity actually helps us. These 9s here would, as the program  
10 progresses, would bubble to the top and the 4s would bubble down.

11 One other point I would like to make is I am having -- what I would  
12 like, I'm asking you, rather than remand this case back to the Examiner, I  
13 would like to ask that it either -- the case either be allowed or put me out of  
14 my misery because I'm really having trouble with this. I believe the  
15 Examiner is having trouble.

16 JUDGE MOHANTY: You are a patent agent.

17 MR. HARTER: Yes, sir.

18 JUDGE MOHANTY: I just wanted to know if you were.

19 MR. HARTER: This is what disturbed me about this whole case.  
20 Claim 13 is extremely narrow. If that was the only claim I would get  
21 allowed, I don't think it would be worth paying the issue fee.

22 I thought certainly, certainly that would be allowed, and it was  
23 rejected. I'm shocked. My goodness, if you are not going to allow that, the  
24 rest of the case is -- claim 13 is the problem we have had with this program  
25 is my wife would almost certainly have headaches during her menstrual  
26 period, which threw these -- many foods she would happen to eat during that

1 period would throw it off.

2 So I thought, Okay, we have got an option where you can either add  
3 or eliminate the period when she has her period. In other words, disregard  
4 that data when she's got her period or consider it.

5 And the Examiner relies on Lowee to reject that claim. And Lowee is  
6 basically saying that toxic shock syndrome -- I don't know if you remember  
7 when that first came up, that is when people had a reaction, for women when  
8 they had their tampons in too long.

9 Lowee basically says toxic shock syndrome can be caused by a  
10 menstrual period or an insect bite. (Snapping fingers.) Rejected by claim  
11 13. I mean, I am just -- I am stumped.

12 So those are really the only claims I have to make.

13 JUDGE MOHANTY: Do you want to say anything about Evans?

14 MR. HARTER: Well, Evans is -- that's just basically a computer  
15 record program. It's something the hospitals and clinics use to keep track of  
16 a patient's records.

17 They want to make sure that before they prescribe medication, that it  
18 doesn't interfere with a person's already known allergies so it doesn't identify  
19 allergies or fend them off. It's just a record-keeping system. This person is  
20 allergic to yeast. Don't give them this antibiotic, basically.

21 JUDGE LORIN: I'm hesitating. I do have questions because I've  
22 been listening to you. I am hearing a lot about distinctions over the prior art  
23 that I'm not really seeing in the claim.

24 For instance, you speak a lot about allergies but I don't see anything  
25 about allergies in the claim. Also, you said something about a connection  
26 between symptom, and was it a symptom and an agent? But I don't see that

1 in the claim either.

2       What I see here is a trial-and-error approach where you are selecting a  
3       plurality of agents, possible agents, possible influencing agents that an  
4       individual may be exposed to. Then you pick another plurality of possible  
5       agents that an individual may be exposed to and then you correlate the  
6       possible agents to the reaction.

7       My question is, what happens if none of the possible agents correlate  
8       to the reaction?

9       MR. HARTER: Then those exposures get basically a zero for that  
10      date. It's not a trial-and-error method. The elimination diet is a trial and  
11      error. This is not a trial-and-error method. The first period is basically  
12      Monday, the second period is Tuesday, third period is Wednesday.

13       JUDGE LORIN: Let me stop you there for a second because I don't  
14      say see anything here about dates.

15       MR. HARTER: No, you are right. I'm not going to be putting dates  
16      in the claims. I'm trying to draft it as broad as possible. I wouldn't refer to it  
17      as a date. I wouldn't refer to it as a food. But I feel like I have already  
18      gotten to the point where the claims are sufficiently narrow. It's not reading  
19      on anything.

20       JUDGE LORIN: That's perfectly your right. I'm just asking  
21      questions to get a sense of the distinction that you are making over the prior  
22      art. I have just been listening to you but the words I am hearing that you are  
23      stressing to make a distinction between what you are claiming and what is in  
24      the prior art.

25       I have the claim before me and I hadn't been able to find those  
26      distinctions. That's the only reason I'm raising this.

1        The other question I wanted to ask you, I'm not familiar with this  
2 entire area regarding allergies and discovering what influences an allergy,  
3 but you mentioned this elimination diet.

4        This is a comprising claim. Does not this method here that I'm seeing  
5 these steps occur before the actual step of eliminating that influencing agent  
6 from the diet to see if it actually works, wouldn't you be practicing these  
7 steps of figuring out which possible influencing agents that a person is  
8 exposed to would correlate to a reaction?

9        MR. HARTER: Well, it's possible the person may never eliminate  
10 these foods. The foods can either be taken sporadically over a period or it's  
11 also possible the person has the food every day.

12        Monday has three portions, Tuesday has one portion. So it's really,  
13 they are not eliminating anything, and the correlation is -- it's an ongoing  
14 calculation as the correlation becomes -- every day it's the longer a period  
15 you run it, the more, the greater the confidence level that you have in the  
16 correlation calculation that you had for each food that happened to be  
17 consumed over a period of time.

18        I'm afraid I didn't answer that question and maybe I don't quite  
19 understand the question, or did I answer it?

20        JUDGE LORIN: Yeah. I think that's fine. I think that's fine. I  
21 appreciate your response.

22        Are there any more questions?

23        Thank you so much for your time.

24        MR. HARTER: Can you give me any indication of your thoughts on  
25 this?

26        JUDGE LORIN: No. We can't do that at the moment. We have to

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1 look at your brief and take a close look at your arguments and then we will  
2 respond to those.

3 MR. HARTER: Thank you.

4 (Whereupon, the proceedings at 9:30 a.m. were concluded.)

5